



IAC-AH-DH-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/49080/2014

THE IMMIGRATION ACTS

Heard at Field House

On 7th April 2016

**Decision & Reasons
Promulgated
4th May 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A M MURRAY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A R B

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Kandola, Home Office Presenting Officer

For the Respondent: Ms Jacqueline Victor-Mazeli, Counsel for Berkleys Solicitors
London

DECISION AND REASONS

1. The Appellant in these proceedings is the Secretary of State however for convenience I shall now refer to the parties as they were before the First-tier Tribunal.
2. The Appellant is a citizen of India born on [] 1988. He appealed against the decision of the Respondent dated 25th November 2014 refusing his application for leave to remain in the United Kingdom as the spouse of a settled person. His appeal was heard by Judge of the First-tier Tribunal

Sweet on 23rd September 2015. The appeal was allowed to the extent that the Respondent should reconsider the application, in a decision promulgated on 7th October 2015.

3. An application for permission to appeal was lodged and permission was granted by Judge of the First-tier Tribunal Pooler on 2nd March 2016. The grounds on which permission was granted took issue with the judge's findings that the Respondent had failed to prove that the Appellant used deception in relation to his English language test certificate. Paragraph 23 of the decision is referred to, in which the judge found that the generic evidence provided by the Respondent was not sufficient to prove that in effect, the Appellant had obtained a certificate by deception. The permission states that it is arguable that in that paragraph the judge failed to give adequate reasons for this finding.
4. There is no Rule 24 response.
5. The Presenting Officer submitted that the judge made a material error of law on a material matter being the Appellant's English language certificate. I was referred to paragraph 23 of the decision which states that the judge is not persuaded that the generic evidence provided by the Respondent is sufficient to meet the burden of proof that the English language certificate was false. The judge refers to challenges to the generic nature of the findings in JP French Associates' report of 5th February 2015. The judge noted that the Appellant is fluent in English and finds that the Respondent has not met the burden of proof in respect of a false document.
6. The Presenting Officer submitted that the evidence in this case was the normal evidence in an ETS case, being standard witness statements from two civil servants. He submitted that the judge appears to have given them no weight but these go to the issue of proving that the Appellant in this case obtained his visa with an invalid test certificate. He submitted that not only was there generic evidence there was also evidence specific to the Appellant referred to at paragraph 7 of the decision. He submitted that the ETS evidence normally consists of a spreadsheet with details of where and when the test was taken. The Presenting Officer submitted that the First-tier Tribunal Judge has not given adequate reasons for rejecting the Respondent's evidence and that had he applied his mind properly he would have reached a different conclusion.
7. I asked about the JP French Associates' report. It is in the Appellant's bundle and is a generic report.
8. The Appellant's representative submitted that the Respondent provided no direct evidence that the Appellant had cheated in the English test. She submitted that the burden of proof is on the Respondent when deception is alleged and she submitted that the two statements from the civil servants contain no specific evidence relating to the Appellant. She submitted that generic evidence from a third party is not sufficient. This is

hearsay evidence not direct evidence. I was referred to paragraph 20 of Rebecca Collings' statement and Counsel submitted that this makes it clear that the evidence is hearsay evidence and submitted that the Respondent's policy is not sufficient for the Tribunal to be able to accept these statements. She submitted that the Tribunal requires the Respondent to produce cogent evidence of deception by the Appellant and the Respondent has to put forward strong evidence which stands up to anxious scrutiny.

9. She submitted that the First-tier Tribunal Judge heard the evidence of the Appellant and his wife and concluded at paragraphs 20 to 21 of his decision that this Appellant's appeal should succeed to a limited extent, in that the student leave should be reinstated and not curtailed.
10. I was referred to paragraph 22 of the decision in which the judge states that the Appellant does not accept that there was any deception and I was referred to the witness statement which gives very detailed evidence about the test and in which he explains the procedure of the test. He also gave his evidence in English.
11. The judge has noted that the Appellant took two further English qualifications in 2014 and at paragraph 23 of the decision the judge states, "There are challenges to the generic nature of the findings in the JP French Associates' report of 5th February 2015." The judge finds that the generic evidence is not enough to satisfy the burden of proof. I was asked to consider paragraphs 21 to 23 of the decision and Counsel submitted that it is clear how the judge came to his decision.
12. I was asked to consider the Upper Tribunal decision on file relating to appeals IA/31380/16920 and IA/36319/2014 before a panel of the President the Honorary Mr Justice McCloskey and Deputy Upper Tribunal Judge Saini. I was handed the summary of this judgment which states at paragraph 1, "The evidence of the Secretary of State's two principal witnesses, Mr Millington and Ms Collings, (the same witnesses as in this claim), is intrinsically limited. Neither witness possesses any relevant qualifications, credentials nor expertise in what is ultimately a scientific field".
13. She submitted that in these cases there was no evidence from the protagonist of the ETS organisation and at paragraph 3 the Tribunal found the evidence of Dr Harrison of JP French to be persuasive. His report contains a litany of criticisms of the ETS voice recognition testing systems both automated and human. Counsel submitted that his opinion is not challenged.
14. The First-tier Judge in our case found the Appellant to be an impressive witness and accepted his evidence in all material respects.

15. Counsel submitted that the First-tier Tribunal Judge gave adequate reasons for his findings. There is no material error of law in his decision and the decision should stand.
16. There were no further submissions from the Presenting Officer.

Decision and Reasons

17. This is an application by the Appellant for leave to remain in the United Kingdom as a spouse but he was found to be unsuitable under the Immigration Rules because he had been found to have cheated when applying for a visa, when sitting his English test. His leave to remain as a student was curtailed on 8th September 2014 although he originally was granted leave to remain in the United Kingdom until 30th May 2017.
18. In the First-tier Tribunal Judge's decision he has set out the facts and evidence properly and under the heading "Findings of Fact" at paragraphs 21 to 23 he properly explains the burden of proof and why he does not find that there was any deception relating to the English language test for which the appellant received a certificate from ETS dated 20th June 2012. The judge refers to the Appellant's statement and the details he gave of the actual test which he sat at Premier Language Training Centre in Barking, Essex on 20th June 2012. The judge refers to the further two English language qualifications he has obtained and the fact that he spoke in fluent English at the hearing. At paragraph 23 he refers to the challenges to the generic nature of the findings in the JP French Associates' report and the generic evidence provided in the statements of the two civil servants. He has given adequate reasons for his findings. There is no material error of law in the judge's decision.

Notice of Decision

19. I find there to be no material error of law in the First-tier Tribunal Judge's decision promulgated on 7th October 2015. I uphold his decision that the Respondent should reconsider the Appellant's application for leave to remain as the spouse of a settled person and that the appeal should be allowed to the extent that the Appellant's student leave should be reinstated and not curtailed.
20. I explained to the Appellant that this does not mean that his application for leave to remain as a spouse in the United Kingdom will be successful.
21. Anonymity has been directed.

Signed

Date

Deputy Upper Tribunal Judge I A M Murray